



# USAPDA

## INTRO to the PDES/Senior Adjudicators Course

### Compensability Criteria

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# Intro to the PDES/Senior Adjudicators Course

## Compensability Criteria

### Objectives



- To understand the following terminology: “incurred while entitled to basic pay,” “aggravation,” “permanent aggravation,” “natural progression,” and “existed prior to term of service.”
- To understand the statutory terms concerning duty status: “active service,” “active status,” “on active duty for more than 30 days,” “on active duty for 30 days or less.’
- To understand the statutory requirements that must be satisfied for an unfitting disability to be compensable.
- To understand when a Soldier is covered for EPTS under 10 USC 1207a.
- To understand the presumptions that apply to AD Soldiers.
- To identify the types of conditions presumed to be EPTS.
- To understand the presumption applicable to RC not on AD.
- To understand how impairments of RC which originated during prior AD are treated.
- To reflect understanding of session objectives by successfully completing PE on subject instruction.



# Intro to the PDES/Senior Adjudicators Course

## Compensability Criteria



### Index of Slides (Omitting Title Page, Objectives, and Index)

- #4 and #5. Terminology
- #6. Two Categories of Law
- #7. General Overview of Requirements (Minus YOS and %)
- #8. Proximate Result
- #9. Statutory Language of 10 USC 1207a (8-Year Coverage)
- #10. 10 USC 1207a (8-Year Coverage): Service Period
- #11. HQUSAPDA Policy Memo on 10 USC 1207a
- #12. Presumptions for Service-Incurred/Aggravated
- #13. RC Presumption of Aggravation for RC 30 Days or Less
- #14. Conditions Presumed to be Pre-existing
- #15. Conditions Incurred during Prior Enlistments, Etc.
- #16. Conditions Incurred while on the TDRL
- #17. Nondisability Separation Pay
- #18. PE: Is the impairment compensable?
- #19 and #20. Answer Key to PE.



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### Compensability Criteria

### Terminology

- Incurred while entitled to basic pay
  - Relates to the duty status of the Soldier when the medical impairment originated—not when the impairment became “unfitting.”
- Aggravation
  - Refers to the worsening of a pre-existing medical impairment due to military service.
  - USAPDA interprets law to require permanent aggravation for both permanent retirement and disability separation with severance pay.
- Natural progression.
  - Natural course of a medical condition.
  - Term usually refers to a medical impairment incurred in a civilian status that was not aggravated by military service.
- Existed prior to term of service (EPTS)
  - Refers to a medical impairment that originated in a civilian status.
  - For RC, it includes an impairment that originated between duty period or unfitting aggravation that occurred between duty periods.
  - **NOTE:** Medical impairments originating during previous enlistments **are not EPTS** conditions.



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### Compensability Criteria

#### Terminology, Cont.

- AD of more than 30 days: AD under a call or order that does not specify a period of 30 days or less. (10 USC 101(d)(2)).
  - Back-to-back orders of less than 30 days that cause the Soldier to be on duty for more than 30 days does not constitute ordered AD of plus 30 days.
  - Thus, 10 USC 1207a (8-year coverage) does not apply to a TPU member performing back-to-back Annual Training that results in more than 30 days served without a break.
  - NDAA 05 added 10 USC 1206a to preclude mobilized RC being covered under 10 USC 1207a (8-year provision) if member is REFRAD within 30 days from mobilization.
- “Active service”: Per 10 USC 101(d)(3), service on active duty or full-time National Guard duty.
- “Active status RC”: RC Soldiers who are in a Troop Program Unit (TPU) or who are in the Individual Ready Reserve (IRR). ”



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## Compensability Criteria

### Two Categories of Disability Law

- Disability law is divided into two categories based on the ordered period of active duty.
  - 10 USC 1201 thru 1203: Ordered AD of more than 30 days (AC and RC on extended AD).
  - 10 USC 1204 thru 1206: Inactive Duty Training or AD of 30 days or less (RC who drill or perform short tours of AD).



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## Compensability Criteria

### General Overview of Requirements (Minus YOS and %)

- With NDAA FY 2000 (5 Oct 99), requirements are generally the same for AC and RC for disabilities incurred after 23 Sep 96 (RC retirement) or before 5 Oct 99 (RC separation) with the exception of coverage under 10 USC 1207a (8-year provision).
  - Be in a duty status designated in 10 USC 1201, etc., and 10 USC 1204, etc. (See presentation on eligibility.)
  - The Soldier's disability is determined by the PEB to be "unfitting." (Meaning, the medical impairment precludes the member for reasonably performing his/her PMOS /specialty duties.)
  - For disability retirement, disability is permanent (to include any aggravation) and stable; otherwise Soldier is placed on the Temporary Disability Retirement, if otherwise eligible.)
  - Disability is permanent or "may be permanent" for separation for disability.
    - Teaching point: Stability not required for disability separation.
  - Not due to misconduct, willful neglect, incurred while AWOL, or resulting from unreasonable failure to follow prescribed medical care.
  - Incurred (originated) or permanently aggravated (worsened beyond the natural progression or course of the impairment) in the line of duty.



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## Compensability Criteria

### Proximate Result



- Pertains to disabilities of RC incurred or aggravated prior to 24 Sep 96 (RC retirement) or 5 Oct 99 (RC separation) while performing IDT or ordered AD of 30 days or less.
- With the exception of 10 USC 1207a, proximate result was the distinctive difference between the disability laws for Regulars and the Ready Reserve prior to 24 Sep 96/5 Oct 99.
- USAPDA uses the 23 Sep 96 date (reference the ending of proximate result) for both retirement and separation under 10 USC 1204 and 10 USC 1206.
- Proximate result is more than “in-line-of-duty” but less than “direct result.”
- Impacts whether LD-yes disabilities incurred after-hour's or off-post are covered for disability.
- PDA legal advisor has guidance on application of proximate result if PEBs receive a case to which it is applicable.



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## Compensability Criteria

### Statutory Language of 10 USC 1207a (8-Year Coverage)



- 1207a. Members with over eight years of active service: eligibility for disability retirement for pre-existing conditions.
- (a) In the case of a member described in subsection (b) who would be covered by section 1201, 1202, or 1203 of this title but for the fact that the member's disability is determined to have been incurred before the member became entitled to basic pay in the member's current period of active duty, the disability shall be deemed to have been incurred while the member was entitled to basic pay and shall be so considered for purposes of determining whether it was incurred in the line of duty.
- (b) A member described in subsection (a) is a member with at least eight years of active service.



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## Compensability Criteria

### 10 USC 1207a (8-Year Coverage): Service Period



- The law concerns disabilities incurred in civilian status—not disabilities due to misconduct, willful neglect, incurred while AWOL, or which were the result of failure to comply with prescribed medical care.
- “Active Service” means active duty.
  - Doesn’t include equivalent service (membership and IDT points divided by 360.)
- The 8 years is total—not continuous—AD days.
  - Includes full-time National Guard duty.
  - Covers RC who mobilize with 8 years of total AD and who are not otherwise excluded under the 10 USC 1206a.



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## Compensability Criteria

### HQUSAPDA Policy Memo on 10 USC 1207a

- Policy/procedures contained in PDA Policy Memo #3, 28 Feb 05
  - If Soldier has 7 years and 9 months at time of PEB informal findings, case will be adjudicated as if Soldier has 8 years.
  - If Soldier does not have 7 years and 9 months, the case will be adjudicated as if 10 USC 1207a does not apply. HQ USAPDA will modify if Soldier obtains 8 years before separation.
- The above applies to mobilized RC cases, notwithstanding the NLT 30-day separation time from for these cases.)
  - PDA will hold the case.



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## Compensability Criteria

### Presumptions for Service-Incurred/Aggravated



- See DoDI 1332.38, para E3.P4.5.2 (page 39) and DoDI 1332.39, para 6.11 (page 7) and 6.11.5 (page 8).
- The presumptions below apply only to Soldiers on ordered AD of plus 30 days.
  - In sound physical condition at entry except for noted conditions.
  - Injury/disease discovered after entry is presumed service-incurred, with the exception of congenital and hereditary conditions.
  - Pre-existing conditions and diseases are presumed aggravated unless accepted medical principles clearly establish natural progression.
    - Medical principle must be cited and explained (DoDI 1332.38, para E.3.P1.3.4.1.3.1 (page 21) and DoDI 1332.39, para 6.11.2 (page 7)).



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### RC Presumption of Aggravation for RC 30 Days or less



- The preceding presumptions do not apply to RC TPU/IRR performing ordered duty of 30 days or less.
- The DoDI 1332.38 states for “prior service impairments.”

“Any medical condition incurred or aggravated during one period of service or authorized training in any of the Armed Forces that recurs or is aggravated during later service or authorized training, regardless of the time between, should normally be considered incurred in the line of duty provided the condition or subsequent aggravation was not the result of the member’s misconduct or willful negligence. In those cases in which the service member reverts to a civilian status after the condition is incurred, the service member must prove by a preponderance of evidence that the medical condition was incurred or aggravated in the line of duty and was not due to intentional misconduct or willful negligence.”



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## Compensability Criteria

### Conditions Presumed to be Pre-existing



- DoDI 1332.38, para E3.P4.5.4 (page 40)
  - Chronic disease manifested within 180 days.
  - Communicable disease within less than the minimum incubation period after entry on active service.



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## Compensability Criteria

### Conditions Incurred during Prior Enlistments, Etc.



- PDA Policy memo #1, 28 Feb 05: Compensating Unfitting Disabilities Incurred During Previous Periods of Extended AD.
  - RA and RC Soldiers currently on extended AD (for example, mobilized RC):
    - Covered if LD-yes and Soldier currently on AD. (Rationale: Origin was "incurred while the member was entitled to basic pay"—one of the standards of 10 USC 1201.)
    - No requirement to prove unfitness at time of release.
    - Noncompensable if the preponderance of evidence establishes current unfitness results from intervening injury or natural progression during break in service.
  - RC performing duty of 30 days or less:
    - Evidence shows the member was unfit when released from AD.
    - If evidence does not establish unfitness at time of REFRAD, there must be permanent aggravation from subsequent duty.
    - Position of memo: Progression to unfitness since leaving a period of extended AD and joining the Reserve is noncompensable. To be compensable, there must be "re-aggravation."



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## Compensability Criteria

### Impairments Incurred while on the TDRL



- Medical impairment must be “unfitting,” and
  - Caused by or related to the impairment for which the Soldier was placed on the TDRL; or
  - Evidence reflects the impairment was unfitting at the time Soldier was placed on the TDRL.
- An AD impairment that meets medical retention standards at time Soldier is placed on the TDRL for another impairment, but which progresses to unfitness while the Soldier is on the TDRL, is non compensable.



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## Compensability Criteria

## Nondisability Separation Pay



- Soldiers with between 6 & 8 years of AD who are unfit for EPTS conditions may receive half-nondisability separation pay.
- In exceptional cases, SA can raise half-separation pay to full pay.
- Governing law for full separation pay is 10 USC 1174: Separation pay upon involuntary discharge or release from active duty.
- DoDI 1332.29 implements the law.
- PEBLO should advise Soldier of this type of pay.
- If pay is not authorized on orders, Transition Point should contact HQDA, Compensation Directorate, Mrs. Holeman, DSN 695-1872.



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## Compensability Criteria

### PE: Is the impairment compensable?



- Soldier's impairment is LD-yes, is ratable under the DVA Schedule for Rating Disabilities, but does not preclude the Soldier from performing his duties.
- Soldier is unfit for an impairment incurred while on excess leave for emergency reasons.
- Soldier is unfit for a hereditary impairment that has become unfitting after 6 years of active service due to the natural progression of the impairment.
- Same as above, but Soldier has more than 8 years of active service.
- RC Soldier performing duty of 30 days or less is hurt during Annual Training in 2005 during the middle weekend. Injury was determined to be in the line of duty. But the PEB does not believe the disability is the proximate result of performing duty since the Soldier was off post horseback riding.
- Soldier is unfit for two impairments, one of which is due to own misconduct.



# Intro to the PDES/Senior Adjudicators Course

## Compensability Criteria

### Answer Key PE: Is the impairment compensable?

- Soldier's impairment is LD-yes, is ratable under the DVA Schedule for Rating Disabilities, but does not preclude the Soldier from performing his duties.  
**No.** The impairment must be found "unfitting" before compensability is considered. The fact that an impairment is ratable under the DVA Schedule doesn't make it unfitting. The DVA rates for all service-incurred impairments that meet the percentage criteria. The military rates only those impairments that cause the termination of the Soldier's career.
- Soldier is unfit for an impairment incurred while on excess leave for emergency reasons.  
**Yes.** 10 USC 1201 - 10 USC 1203 was amended to provide coverage while in excess leave for emergency reasons as determined by the SA. Previous to this amendment, Comptroller General decision held that a Soldier on excess leave for review of courts martial conviction was not covered for disability benefits. That decision was interpreted to apply to all excess leave.
- Soldier is unfit for a hereditary impairment that has become unfitting after 6 years of active service due to the natural progression of the impairment.  
**No.** Hereditary impairments and other EPTS impairments are not covered until the Soldier is on extended AD with at least a total of 8 years of Active Service unless the impairment has been permanently aggravated. Even if the hereditary impairment was not discovered until after entry, such is not compensable because the law is in terms of an impairment incurred while entitled to basic pay." Based on Comp Gsn decision, "incurred" means the duty status of the impairment at time of onset (origin) of the impairment—not the duty status when the member is determined unfit.



# Intro to the PDES/Senior Adjudicators Course

## Compensability Criteria



### Answer Key PE: Is the impairment compensable?

- Same as preceding, but Soldier has more than 8 years of active duty.

**Yes**, so long as the member is currently on extended active duty.

- RC Soldier performing duty 30 days or less is hurt during AT in 2004.

**Yes**. “In-line-of-duty”—not proximate result—is the criteria for disabilities incurred after 23 Sep 96.

- Soldier is unfit for two conditions, one of which is due to own misconduct.

**Yes/no**. The impairment not due to misconduct is compensable.